

2

NO. A05-118

State of Minnesota  
**In Supreme Court**

STATE OF MINNESOTA,

*Respondent,*

vs.

ROBERT VINCENT LARSON,

*Appellant.*

**APPELLANT'S BRIEF**

LORI SWANSON  
Attorney General  
State of Minnesota  
Suite 1400, Bremer Tower  
445 Minnesota Street  
St. Paul, MN 55102

CRAIG E. CASCARANO  
(#0015544)  
Cascarano Law Office  
150 South Fifth Street, Suite 3260  
Minneapolis, MN 55402  
(612) 333-6603

ROBERT PLESHA  
Assistant Ramsey County Attorney  
315 Ramsey County Gov't Center West  
50 West Kellogg Boulevard  
St. Paul, MN 55102

DEBORAH A. MACAULAY (#0386867)  
Macaulay Law Offices, LLC  
649 Grand Avenue, Suite 2  
St. Paul, MN 55105  
(651) 240-1153

*Attorneys for Respondent*

*Attorneys for Appellant*

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... i

**TABLE OF AUTHORITIES** .....iii

**PROCEDURAL HISTORY** ..... 1

**ISSUES** ..... 4

**STATEMENT OF CASE AND FACTS** ..... 5

**Statement of Case** ..... 5

**Statement of Facts** ..... 8

**A. The Death of T ██████ C ██████, Jr.** ..... 8

**B. The State’s Theory of the Case** ..... 9

**C. Evidence Not Presented to the Jury** ..... 13

**ARGUMENT** ..... 15

**Summary of Argument** ..... 15

**I. The State’s repeated reference to Mr. Larson’s refusal to submit to voluntary DNA testing as evidence of guilt violates his due process right to a fair trial.** ..... 16

**Standard of Review** ..... 16

**A. The District Court decision to allow the State to present Mr. Larson’s refusal to submit to voluntary DNA testing as evidence of guilt constitutes an abuse of discretion.** ..... 16

**B. The State’s use of this evidence was repetitive and direct, and cannot be disposed of as harmless error. ....20**

**II. The cumulative effect of the district court’s evidentiary rulings barring evidence of third party perpetrators, admitting co-conspirator statements, and denying the use of interrogation transcripts deprived Mr. Larson of the opportunity to present a reasonable defense. ....21**

**Standard of Review .....21**

**A. The District Court’s decision to preclude Mr. Larson from eliciting proper third party perpetrator testimony was in error, improperly denying him the right to present the fundamental elements of his defense. ....22**

**B. The district court’s finding that defense transcripts lacked sufficient authentication, and denial of Mr. Larson’s request for an extension of time to obtain properly authenticated transcripts, deprived him of the foundation with which he could cross-examine the witnesses against him. ....25**

**C. The district court’s decision to allow the State to proffer coconspirator nonhearsay statements of declarants who were available to testify at trial impermissibly circumvents the rule in *Crawford*, and deprived Mr. Larson of the right to confront witnesses against him. ....27**

**CONCLUSION .....30**

## TABLE OF AUTHORITIES

### Cases

<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	23
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	27, 30
<i>Griffin v. California</i> , 380 U.S. 609 (1965).....	19
<i>Huff v. State</i> , 698 N.W.2d 430 (Minn. 2005).....	26
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961).....	18
<i>State v. Al-Nasseer</i> , 690 N.W.2d 744, 748 (Minn. 2005).....	22
<i>State v. Beck</i> , 183 N.W.2d 781 (Minn. 1971).....	19
<i>State v. Gutierrez</i> , 667 N.W.2d 426 (Minn. 2003).....	24
<i>State v. Hall</i> , 764 N.W.2d 837 (Minn. 2009).....	18, 19, 23
<i>State v. Hawkins</i> , 260 N.W.2d 150 (Minn. 1977).....	23, 24, 26
<i>State v. Jones</i> , 678 N.W.2d 1 (Minn. 2004).....	5
<i>State v. Juarez</i> , 572 N.W.2d 286, 291 (Minn. 1997).....	18, 21
<i>State v. King</i> , 622 N.W.2d 800 (Minn. 2001).....	31
<i>State v. Litzau</i> , 650 N.W.2d 177 (Minn. 2002).....	21
<i>State v. Mitchell</i> , 130 N.W.2d 128 (Minn. 1964).....	19
<i>State v. Pierce</i> , 364 N.W.2d 801 (Minn. 1985).....	29
<i>State v. Pride</i> , 528 N.W.2d 862, 865 (Minn. 1995).....	28
<i>State v. Richardson</i> , 670 N.W.2d 267 (Minn. 2003).....	25, 26
<i>State v. Smith</i> , 563 N.W.2d 771 (Minn. Ct. App. 1997).....	31
<i>State v. Vance</i> , 254 N.W.2d 353 (Minn. 1977).....	19

*U.S. v. Owens*, 484 U.S. 554 (1988).....28

*United States v. Prescott*, 581. F.2d 1343, 1351 (9<sup>th</sup> Cir. 1978). ..... 19

**Statutes**

609.05 .....2

Minn. Stat. §§ 609.185 .....2

Minn. Stat. §§ 609.19 .....2

**Rules**

Minn. R. Evid. 801(2).....29

Appellate Court File No. A05-118

STATE OF MINNESOTA  
IN SUPREME COURT

---

STATE OF MINNESOTA,

*Respondent,*

vs.

APPELLANT'S BRIEF

ROBERT VINCENT LARSON,

*Appellant.*

---

**PROCEDURAL HISTORY**

- February 4, 2004: Complaint filed in State v. Robert Vincent Larson, Ramsey County District Court, charging first degree murder in violation of Minn. Stat. §§ 609.185(1) and 609.05, and second degree murder in violation of Minn. Stat. §§ 609.19, Subd. 1(1) and 609.05, alleged to have been committed on November 28, 2003.
- April 21, 2004: Grand jury indictment returned in State v. Robert Vincent Larson, Ramsey County District Court, accusing Larson first degree murder in violation of Minn. Stat. §§ 609.185(1) and 609.05, and second degree murder in violation of Minn. Stat. §§ 609.19, Subd. 1(1) and 609.05, alleged to have been committed on November 28, 2003.
- September 13, 2004: Rasmussen hearing held covering issues regarding statements of co-conspirators, search warrant, Grand

- Jury indictment, statement by Defendant, a photo display, and sequestration.
- September 13, 2004: The Honorable Edward S. Wilson, Judge of District Court, Ramsey County, grants State's motion to admit testimony of co-conspirators, denies Defendant's motion to quash the search warrant and Grand Jury indictment.
- September 20, 2004: State moves to preclude Defendant from introducing third party perpetrator or reverse-*Spreigl* evidence. The Honorable Edward S. Wilson, Judge of District Court, Ramsey County, grants the State's motion.
- October 1, 2004: Motion hearing. Defendant seeks to use transcripts of witness statements made during interrogation for purposes of cross-examination. The Honorable Edward S. Wilson, Judge of District Court, Ramsey County, denies Defendant's motion.
- October 5, 2004: Motion hearing. The Honorable Edward S. Wilson, Judge of District Court, Ramsey County, grants State's motion to present hearsay testimony of coconspirators, and denies Defendant's motion to quash the warrant.
- October 6, 2004: Jury Trial begins.
- October 20, 2004: Jury returns verdict of guilty, first degree murder. Judge Wilson immediately imposes a sentence of life.
- January 19, 2005: Appellant filed notice of appeal and Statement of Case.
- June 17, 2005: Trial transcripts received by appellate counsel.
- August 15, 2005: Appellant requested stay of proceedings in order to pursue postconviction relief.
- August 19, 2005: Stay granted; appeal to be reinstated at completion of postconviction proceedings.
- May 5, 2009: Supreme Court reinstated appeal.

July 2, 2009: On motion of Appellant, Supreme Court grants extension of time to file brief.

August 28, 2009: On motion of Appellant, Supreme Court grants extension of time to file brief.

October 16, 2009: Appellant moves for an extension of time to file brief.

## ISSUES

### **I. Whether the State's repeated use of Appellant's refusal to submit to voluntary DNA testing as evidence of guilt violates his due process right to a fair trial?**

The District Court found that repetitive, focused use of Appellant's refusal to submit to voluntary DNA testing could be used as evidence of guilt at his trial.

Apposite Authority:

*State v. Jones*, 678 N.W.2d 1 (Minn. 2004).

### **II. Whether the cumulative effect of the district court's evidentiary rulings barring evidence of third party perpetrators, admitting coconspirator statements, and denying the use of interrogation transcripts deprived Appellant of the opportunity to present a reasonable defense?**

The district court granted the State's motion to preclude Mr. Larson from eliciting testimony of third party perpetrators, allowed the State to use nonhearsay coconspirator statements even where the original declarants were available, and refused Mr. Larson's request for additional time to obtain a properly authenticated transcript.

Apposite Authority:

*State v. Jones*, 678 N.W.2d 1 (Minn. 2004).  
*Crawford v. Washington*, 541 U.S. 36 (2004).

## STATEMENT OF CASE AND FACTS

### Statement of Case

Appellant Robert Vincent Larson ("Mr. Larson") was indicted on two counts of murder (first degree premeditated murder and second degree aiding and abetting). He appeared before the Honorable Edward S. Wilson in Ramsey County District Court, pleaded not guilty to all charges, and the matter was set for a jury trial.

In the months before Mr. Larson's trial, both the State and Mr. Larson's trial counsel brought multiple motions before the court. Mr. Larson moved to quash the warrant and exclude the fruits thereof, to quash the Grand Jury indictment, he challenged the photo lineup from which he was identified, and he moved to suppress his statement to the police. He brought motions in limine, seeking to prevent the State from mentioning highly prejudicial material before the jury. The Honorable Edward S. Wilson, Ramsey County District Court, denied each of his motions in turn.

Challenging Mr. Larson's motions in limine, the State prevailed in offering testimony that Mr. Larson "hid his hands" when asked that they be photographed. The State would also be permitted to offer testimony that Mr. Larson refused to perform voluntary DNA testing, when others had not exercised that right. Next, the State moved to admit police officer testimony as to coconspirator statements,

and moved to preclude Mr. Larson from eliciting 3<sup>rd</sup> party perpetrator and/or reverse *Spreigl* evidence from its witnesses. The District Court granted both motions.

With his hands tied as to how he could effectively cross-examine the State's witnesses, Mr. Larson's trial counsel turned to the police interrogations. The police had taped the interrogation of each witness. Since most of the witnesses had clearly lied to the police, and changed their stories *significantly* between interviews, counsel had the tapes transcribed for impeachment purposes. The State objected to the use of those transcripts, stating that the police would not have adequate time to authenticate them, and noting that defense counsel could refer to the Grand Jury transcripts. Despite the fact that the Grand Jury testimony would be identical to that proffered at trial, the District Court disallowed the use of the interrogation transcripts, and declined Mr. Larson's request for an extension of time to obtain comparable material.

The trial began, and as expected, the State called a plethora of witnesses, some of whom were both present at the scene of the crime, had previously been assaulted and threatened by the victim, and who had themselves indicated their intent to kill the victim. Pursuant to the District Court's orders, defense counsel was barred from eliciting this testimony. Equally alarming, defense counsel was unable to properly impeach *any* of the witnesses present on the evening in question. The District Court's decision to disallow the use of the interrogation transcripts stripped him of the ability to lay the foundation to prove prior, very

inconsistent statements.

Next, the State called officers to the stand. Officer Briggs gave extensive testimony as to statements of “co-conspirators.” One of the alleged “co-conspirators” was presumably indicted in connection with the case. But the others—in particular ██████████ ██████████—a drug dealer who’d been recently threatened at gunpoint by the victim, who was present at the scene of the crime the night the victim died, and who had made statements to the effect that he wanted to kill the victim, were never properly shown to be coconspirators.

In fact, Ramon Andujar had testified earlier in the trial, but as already noted could not be effectively cross-examined. His testimony was self-serving and self-exculpating. The State did not seek to show that he was a co-conspirator in any way. Nonetheless, the State presented third party police officer testimony of statements that Andujar had made during interrogation. The Court allowed this testimony as non-hearsay statements of a coconspirator.

At the close of the State’s case-in-chief, Mr. Larson was left with one witness to testify on his behalf. Certified Crime and Intelligence Analyst ██████████ ██████████, of the Ramsey County Sheriff’s Department, testified to a phone conversation that took place at the jail before the trial. Dan Iacarella, the State’s presumably sole “co-conspirator” in the case, made a call to an unidentified male. In sum, he stated that he had information that would get him out of jail, and that this information affected the person at the other end of the line. He suggested they meet, as “this is about my life and your life.” The implication

should have been inescapable—Dan Iacarella had information that would implicate this unidentified male in the murder. Mr. Larson was in custody. He could not have been the person on the other end of the line.

Apparently this testimony wasn't clear to the jury. The jury returned a verdict of guilty and Mr. Larson was sentenced to life in prison. This appeal followed.

### **Statement of Facts**

#### **A. The Death of T ██████ C ██████, Jr.**

On November 28, 2003, Deputy Ken Splittstoesser of the Ramsey County Sheriff's Department responded to a resident's report of a body found in Little Canada, MN. T. 1229<sup>1</sup>. A vehicle belonging to Mr. T ██████ C ██████, Jr. (C ██████) had been located near the scene, and the body was quickly identified as that of C ██████. T. 1232. C ██████ appeared to have been strangled using a zip tie device, and the death was ruled a homicide. T. 1546. Investigating Officer ██████ ("█████"), also of the Ramsey County Sheriff, eventually learned that C ██████ had recently been present at the White Bear Lake Travel Lodge Hotel, injecting methamphetamine with several other individuals. Trans. 1432. ██████ conducted interviews with the individuals who had been present at the hotel, or in contact with C ██████ in the preceding days. 1433.

---

<sup>1</sup> References to the Trial Transcript are cited as "T. \_\_\_\_."

Eventually [REDACTED] came to rely in large part on the statement of one [REDACTED], a local drug dealer who had been recently threatened at gunpoint by [REDACTED], and who had followed [REDACTED] to the crime scene on the night that he died. Trans. 966.

#### **B. The State's Theory of the Case**

The State developed its theory of the case by relying on the statements of witnesses who, admittedly, were using methamphetamine very heavily, and at the time, were in various stages of highs and withdrawals. See, e.g., Trans. 1098. No witness was able to provide any form of reliable timeline, or answer questions, with any degree of certainty. Their statements fluctuated wildly between interviews and witnesses. See, e.g., Trans. 994. However, the police managed to piece together what the State alleges happened on the day in question, and to eke out a case against Mr. Robert Larson.

Essentially, the State alleges as follows: [REDACTED] called his then-girlfriend, [REDACTED], stating that people were following him and asking her to come and see him. Statement of [REDACTED], 4. [REDACTED] and her brother, Mr. Larson, met up with [REDACTED], and found him hiding in a tree in a trailer park. Id. at 5. [REDACTED] and [REDACTED] took [REDACTED]'s car to White Castle, where Mr. Larson left his car and joined them in [REDACTED]'s car. Id. at 7. The three then went to the Travel Lodge, where the rest of the group had obtained two rooms for use while using methamphetamine. Id.

After some time, C ■ told the others that “he needed to do a job.” Id. at 9. Essentially, he was going to All State, in the middle of the night, to somehow get money for more meth. He stopped at a gas station, but didn’t have money for gas, so he called two other friends who stopped by and paid for it. T. 1416. At some point later on, he went to sleep in his truck in the parking lot of the Travel Lodge hotel. T. 1024.

At this point, the State alleges that ■ is getting worked up in the hotel room, and is telling people about how C ■ had hit her, and that C ■’s uncle had raped her, and that he needed to be taught a lesson. T. 1046. She is holding C ■’s gun, and telling them that C ■ is asleep in his truck. T. 1024

The State believes that she enlisted her cousin, ■, to retrieve some zip ties from his truck, so that she could tie him up. Anjubar testified that he saw ■ and Mr. Larson leaving the hotel, and that Mr. Larson brandished the zip tie in front of him. T. 970. There was also testimony that Jamie and Mr. Larson got into C ■’s truck and drove away with C ■ sleeping. T. 1109. (How they moved C ■ from the driver’s seat and drove off without waking him is a source of confusion.)

According to ■ he and ■ followed C ■’s truck onto 35E North, “in order to stop them from doing anything.” T. 1016. (Despite the fact that he claims he was trying to keep them from hurting C ■, he claims he attempted to get them to drive the speed limit so as to not attract police attention.)

██████████ and ██████████ apparently followed C██████████'s truck nearly all of the way to the crime scene, before they had a sudden change of heart, and decided not to trail them the last few blocks. T. 1006. Thereafter, they claim that they just happened to see Mr. Larson and ██████████ running from the scene, and gave them a ride to the S.A. near the hotel. T. 982.

The police interviewed Mr. Larson, and noted that he had abrasions on his hands. T. 1433. Mr. Larson responded that he lays tack strip for carpeting. T. 1418. He was asked to provide a voluntary DNA sample, and he declined. The police obtained a warrant for his body, and obtained his DNA. T. 1304.

After DNA analysis, the State was able to determine that Mr. Larson's DNA was on the outside of the door handle of the truck that ██████████ and ██████████ drove on the night in question, T. 1476, and that his fingerprints were also inside the truck, corroborating ██████████ statement that Mr. Larson had, in fact, been in ██████████ truck. The State also determined that C██████████ had his own DNA on his own body, and on the zip tie at the scene, T. 1492; that cigarette butts in C██████████'s truck likely belonged to one ██████████ that other cigarette butts near C██████████'s truck had the DNA of his father, who had come to retrieve the truck before his body was found, T. 1483; and that a blond hair had no DNA to offer. T. 1479.

The Medical Examiner testified that he had conducted an experiment to determine whether the injuries to Mr. Larson's hands were consistent with strangling C██████████ with a zip tie. T. 1545. He did so by tying a zip tie around his

own arm, and having his truck-driver friend pull on the cord. T. 1555. From this, he determined that the injuries to Mr. Larson's hands were consistent with pulling a zip tie. *Id.* (Mr. Larson's employer testified at his trial, and stated that the injuries were to be expected in Mr. Larson's line of work). T. 1418.

The other evidence relied upon, and received at trial, included foggy video tapes from the S.A. and White Castle, both of which showed that trucks and SUV's came and went, and parked in their lots; a video tape showing that C ■■■ had stopped for gas, and had friends come and pay for it; and statements from people who were strung out on methamphetamine as to Mr. Larson's motive, whom they had just met, to kill C ■■■.

The State also went to great lengths to demonstrate that Mr. Larson "is not the person he appears to be today," by repeatedly commenting on Mr. Larson's appearance and attire. Several witnesses are asked whether Mr. Larson normally wears a tie, for example. *See, e.g.*, T. 960, T. 1094, T. 1095.

Finally, one series of testimony elicited by the State at trial is of particular concern, in that it may have seriously misled the jury with respect to DNA evidence. While testifying, DNA analyst ■■■■■ is asked to identify the DNA on the murder weapon. He identifies it as the victim's, and then indicates that there is a second, different person's DNA on the zip tie as well. The line of questioning then immediately shifts to whether the DNA left on the door handle of

██████████ rental car in fact belonged to Mr. Larson. It did. *See*, T. 1492, T. 1495.

### **C. Evidence Not Presented to the Jury**

As is noted above, Mr. Larson was precluded from effectively cross-examining any of the witnesses against him, and could therefore not present that evidence to the jury. But in addition to this, other evidence was withheld from the jury as follows.

Just before Mr. Larson's trial (in fact just days before his trial, and midway through his sister's), the police obtained DNA from the other potential suspects in this case and submitted it for analysis to the BCA. This testing was not ready at the time Mr. Larson's case commenced, and the district court refused to continue the trial so that the testing could be completed. This was not available for use at Mr. Larson's trial.

Also unavailable to the jury was third party perpetrator evidence. The State outlined this evidence nicely in its motion to exclude this evidence:

- 1) ██████████, who was present in the Travel Lodge the night TJ (██████) died and was also present near the scene of his death. He possessed the zip strips at least one of which he and other witnesses state was given to Defendant Robert Larson.
- 2) ██████████, who was present in the Travel Lodge the night that TJ died and also was present near the scene of his death. A couple weeks

before Thanksgiving Jamie Larson brought TJ to [REDACTED] place. TJ pulled a gun on [REDACTED] and demanded \$1400 dollars that [REDACTED] owed [REDACTED]. [REDACTED] refused to give him the money and instead said "if you wanna, go ahead and shoot me." TJ and Jamie Larson sped off in TJ's truck. Jamie Larson said nothing to protect [REDACTED] during the incident.

- 3) [REDACTED] told police investigators that he had heard from TJ that Bob Moon had put a 500 dollar bounty on TJ.
- 4) [REDACTED] was involved with Jamie Larson. TJ saw her come out of [REDACTED] bedroom with no clothes on. TJ threatened [REDACTED] and his kids. [REDACTED] told investigators he had nothing to do with the murder. Jamie Larson stopped at his place [at some point after the murder had occurred].
- 5) [REDACTED] suspected TJ of stealing his work trailer. He stated that he jokingly told people he would pay \$500 to find TJ's location.
- 6) [REDACTED] opined to the police that [REDACTED] was responsible for killing TJ. When interviewed by the police, [REDACTED] appeared to have a broken nose, and swollen hands from fighting.
- 7) [REDACTED] stated that TJ "jacked bo" for 1.5 ounces of meth. She had no opinion on who murdered TJ.
- 8) [REDACTED] said TJ was doing "numerous rips of drug dealers."

At trial, Mr. Larson did not seek to dredge up every conflict that C ■ had had with the people in this crowd. He did, however, wish to address the motive, opportunity, and expressed intent of two individuals he believed were responsible for the murder: ■ and ■. As is mentioned above and will be discussed in turn, he was not permitted to do so.

## **ARGUMENT**

### **Summary of Argument**

This case presents a situation where multiple evidentiary errors have compounded upon one another. The cumulative effect is that Mr. Larson has been denied an opportunity to a fair trial, and to present a meaningful defense. His right to be free from a warrantless search of his body, or in other words, his right to refuse that search without penalty, has been violated. This is a result of the district court's finding that his refusal to be searched without a warrant could be offered as evidence of guilt at his trial. The showing was not isolated to a particular instance, but was systematic and calculated to show evidence of guilt throughout the entire trial. This was compounded exponentially thereafter by the district court's consistent rulings against the defense with respect to issues of evidentiary admissibility, such that Mr. Larson was left completely void of the opportunity to present a meaningful defense on his behalf. The trial court abused its discretion in allowing impermissible inferences of guilt to be drawn from the exercise of the

Constitutional right to be free from unreasonable searches, and magnified that error with consistently unfair, highly prejudicial, and erroneous evidentiary findings against Mr. Larson. The result of these cumulative errors has undermined his ability to present the fundamental elements of his defense, and cannot be dismissed as harmless error.

**I. The State's repeated reference to Mr. Larson's refusal to submit to voluntary DNA testing as evidence of guilt violates his due process right to a fair trial.**

**Standard of Review**

The determination of whether evidence presented is constitutionally sound and admissible at trial is within the discretion of the trial court. Those determinations are upset only when the trial court has abused its discretion. *State v. Hall*, 764 N.W.2d 837 (Minn. 2009). Where it is determined that the trial court erred and abused its discretion, a showing of prejudice sufficient to withstand a harmless error analysis will result in a new trial. *Id.* Where there is a constitutional error, that error must be found harmless beyond a reasonable doubt to withstand scrutiny. *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997).

**A. The District Court decision to allow the State to present Mr. Larson's refusal to submit to voluntary DNA testing as evidence of guilt constitutes an abuse of discretion.**

The Minnesota Constitution provides that all persons are to be secure in their persons, and free from unreasonable searches and seizures. The 4<sup>th</sup> Amendment of the United States Constitution provides a parallel guarantee,

applied by way of the Due Process Clause of the 14<sup>th</sup> Amendment to the States.  
*Mapp v. Ohio*, 367 U.S. 643 (1961).

Generally speaking, the determination of whether evidence presented is constitutionally sound and admissible at trial is within the discretion of the trial court. Those determinations are upset only when the trial court has abused its discretion. *State v. Hall*, 764 N.W.2d 837 (Minn. 2009). Where it is determined that the trial court erred and abused its discretion, a showing of prejudice sufficient to withstand a harmless error analysis will result in a new trial. *Id.* Here, the trial court erred in admitting evidence of Mr. Larson's constitutionally protected right to decline a warrantless search.

This Court has stated that the right to be free from unwarranted searches means that "a passive refusal to consent to a search cannot be treated as evidence of a crime." *State v. Jones*, 678 N.W.2d 1 (Minn. 2004) quoting *United States v. Prescott*, 581 F.2d 1343, 1351 (9<sup>th</sup> Cir. 1978). "If the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be 'freely and voluntarily given.'" *Jones*, quoting *Prescott*, 581 F.2d at 1351. Use of evidence such as this is considered improper and unduly prejudicial, because the jury will infer that the refusing party did so to conceal evidence of guilt. See *State v. Hall*, 764 N.W.2d 837 (court erred in admitting defendant's request for a lawyer; the jury was likely to infer from it that he was concealing guilt); *Griffin v. California*, 380 U.S. 609 (1965) (no negative inferences may be drawn from

defendant's choice to exercise right not to testify); *State v. Mitchell*, 130 N.W.2d 128 (Minn. 1964) (improper to force defendant to the stand who will plead the right against self-incrimination); *State v. Beck*, 183 N.W.2d 781 (Minn. 1971) (it is impermissible to allow prosecution to comment on silence following a Miranda warning); *State v. Vance*, 254 N.W.2d 353 (Minn. 1977) (admission of testimony regarding defendant's refusal to give a statement is constitutional error).

Here, Mr. Larson was asked to provide a DNA sample to the police. The police had not obtained a warrant for his body, and informed him that his consent was voluntary. He said that he didn't know whether he wanted to consent, and eventually refused. As was the case in *Jones*, the police later obtained a warrant for Mr. Larson's body, based in part on his initial refusal to consent to the search. Once they'd obtained a warrant, Mr. Larson submitted to the testing.

Despite the fact that Mr. Larson's trial counsel had objected to the use of his initial refusal, the District Court found that "...the defendant, as any citizen does, has a right to refuse, but the refusal certainly should come before the jury. It doesn't have constitutional dimensions." T. 871.

The State then used his passive refusal to consent to the previously unwarranted search as evidence of guilt at trial. In fact, this was a central theme in the State's case—who did, and who did not, consent to the DNA testing. A cursory perusal of the trial transcripts shows that evidence of who did, and who didn't, voluntarily submit to this testing was presented to the jury on a minimum of *fifteen* separate occasions. At every turn and with every applicable witness,

the prosecution asked whether they had voluntarily submitted to DNA testing. And at every possible turn, the prosecution elicited who did not voluntarily submit. Namely, Mr. Larson. (This is not to be interpreted as eliminating all other suspects, as the State did not seek to test the DNA obtained from all potential suspects. It was merely collected.)

The State's use of Mr. Larson's refusal most certainly does have constitutional dimensions. Mr. Larson's refusal to consent to an unwarranted search of his person is no different than invoking any other of his fundamental state and federal constitutional rights. "[O]ne may not be penalized for asserting this right...just as a criminal suspect may validly invoke his Fifth Amendment privilege to shield himself from liability, so may one withhold consent to a warrantless search...." *State v. Jones*, 678 N.W.2d 1 (Minn. 2004).

This is also not an isolated case where a prosecutor refers to a defendant's refusal to submit to an unwarranted search accidentally, or in passing. (That is not to say that such a reference is constitutionally permissible. *See State v. Litzau*, 650 N.W.2d 177 (Minn. 2002) (state has duty to prepare its witnesses such that there is no unsolicited reference to defendant's exercise of constitutional rights). This a case where defense counsel objected to the use of Mr. Larson's constitutionally protected refusal, multiple times. It's a case where the court directly permitted the State to repeatedly and deliberately focus the jury's attention on the fact that Mr. Larson declined to submit to an unwarranted, voluntary search of his body. The

inevitable inference is one of guilt—the inference that exercise of a constitutional right is evidence of having something to hide.

**B. The State’s use of this evidence was repetitive and direct, and cannot be disposed of as harmless error.**

This error occurred throughout Mr. Larson’s trial. It was built into the State’s trial strategy. And although it is subject to harmless error analysis, it is a constitutional error, and must therefore be found harmless beyond a reasonable doubt. *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997). In making that determination, the reviewing Court will consider the manner in which the evidence was presented, whether it was persuasive, whether it was used in closing, and whether it was effectively countered by the defendant. *State v. Al-Nasseer*, 690 N.W.2d 744, 748 (Minn. 2005). Here, the erroneously admitted evidence was a focal point of the trial. As mentioned, it was pointed out to the jury *no less than* fifteen separate times. Surely repeated references to Mr. Larson’s refusal were persuasive to the jury, as each separate reference was yet another inference of guilt, another reminder that he “must have something to hide.” Similar references are made in the State’s closing argument as well. After Officer ██████████ testified (repeatedly) that he had been required to obtain Mr. Larson’s DNA forcibly, by obtaining a warrant, the State closed with the following statement: “You heard from ██████████ that he took DNA from several people and he told you why.”

Mr. Larson wasn't able to effectively counter the attack on his refusal to voluntarily submit to DNA testing. How does one cross-examine that? Impeach it? The only conceivable way that Mr. Larson could have countered this attack was to explain his decision himself, and thereby sacrifice yet another of his constitutional protections.

The weight of the error here cannot be extracted from other evidence presented to the jury. The error was repetitive, highly prejudicial and impermissible. The trial court abused its discretion when it dismissed Mr. Larson's fundamental, Fourth Amendment rights as "housekeeping" and "nothing of constitutional dimension." The manner in which the evidence was presented, the level of prejudice to Mr. Larson, and his inability to rebut it means that this error cannot be harmless beyond a reasonable doubt.

**II. The cumulative effect of the district court's evidentiary rulings barring evidence of third party perpetrators, admitting co-conspirator statements, and denying the use of interrogation transcripts deprived Mr. Larson of the opportunity to present a reasonable defense.**

### **Standard of Review**

The determination of whether evidence presented is constitutionally sound and admissible at trial is within the discretion of the trial court. Those determinations are upset only when the trial court has abused its discretion. *State v. Hall*, 764 N.W.2d 837 (Minn. 2009). Where it is determined that the trial court erred and abused its discretion, a showing of prejudice sufficient to withstand a harmless error analysis will result in a new trial. *Id.* Where there is a

constitutional error, that error must be found harmless beyond a reasonable doubt to withstand scrutiny. *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997).

**A. The District Court's decision to preclude Mr. Larson from eliciting proper third party perpetrator testimony was in error, improperly denying him the right to present the fundamental elements of his defense.**

The right to present witnesses in one's own defense is constitutionally protected. *Chambers v. Mississippi*, 410 U.S. 284 (1973). This includes evidence tending to show that a third party, other than the defendant, committed the crime at issue. *State v. Hawkins*, 260 N.W.2d 150 (Minn. 1977). In order to establish third party perpetrator evidence, the defendant must show that it has an inherent tendency to connect the third party with the commission of the crime. *State v. Jones, infra*. This determination is subject to the ordinary rules of evidence, just as is other exculpatory evidence. *State v. Gutierrez*, 667 N.W.2d 426 (Minn. 2003).

“Exclusion of evidence supporting a defendant's theory that an alternative perpetrator committed the crime with which the defendant is charged will almost invariably be declared unconstitutional when it significantly undermines the fundamental elements of the defendant's defense.” *State v. Jones*, 678 N.W.2d 1 (Minn. 2004). This is especially true where, as here, the defendant seeks to show that someone involved with the trial is the actual perpetrator. In *State v. Hawkins*, 260 N.W.2d 150 (Minn. 1977), this Court held that “where a third person is a state's witness with a possible motive to convict the defendant and save himself,

the rule admitting the otherwise competent evidence of a third person's guilt is especially applicable.”

Here, Mr. Larson sought to introduce evidence that two of the State's witnesses had committed the murder for which he was being tried. First, Mr. Larson sought to introduce evidence that [REDACTED], witness for the State, was the perpetrator. [REDACTED] had threatened to kill the victim for pulling a gun on him the week prior to the homicide. Two weeks prior to the homicide, the victim had pistol-whipped [REDACTED]. Investigators learned that one [REDACTED] was aware that [REDACTED] wanted to kill the victim. Another witness, one [REDACTED], told investigators that a guy named [REDACTED] was after the victim. [REDACTED] was commonly known as [REDACTED]. Just before the homicide, the victim pulled a gun on [REDACTED] and demanded money from him. After all of this was said and done, [REDACTED] testified that he was in the vicinity when the crime occurred, but claims that someone else committed it.

Next, Mr. Larson sought to introduce evidence that State witness [REDACTED], who was with [REDACTED] on the night in question, either committed, or aided [REDACTED] in committing, the homicide. On the night of the homicide, the victim pointed a gun at [REDACTED] and chambered a round. He possessed the murder weapon—the zip strips were his. He admitted following the victim to the scene of his death, and matches the general description of the perpetrator leaving the scene.

Both State witnesses ██████████ and ██████████ have obvious motives to lie. Yet the State claimed, and the district court apparently agreed, that the above-circumstances lacked an inherent tendency to connect them with the commission of the crime. While it is true that the Supreme Court requires more than mere presence at the crime scene, *State v. Richardson*, 670 N.W.2d 267 (Minn. 2003), this is certainly not an attempt by Mr. Larson to “throw strands of speculation on the wall to see if any of them will stick.” *Id.* In fact, as an offer of proof, the basis for Mr. Larson’s position is present in the very recordings that the police testified to at trial.

Moreover, Mr. Larson provided a very direct nexus between the believed third party perpetrators and the victim that night. Both had been violently assaulted by the victim, with a gun, in recent days. Both admitted to wanting the victim dead. Both followed the victim to the scene of his death. Both had access to the implement used to kill the victim. And both had a very obvious motive to lie in this case.

Mr. Larson should have been permitted to cross-examine third party perpetrators, especially those who are state witnesses, on their motives, threats, and other miscellaneous facts tending to prove those third parties committed the crime. *State v. Hawkins*, *supra*. Their motives, threats and such facts are admissible without further evidence connecting the perpetrator to the crime. *State v. Jones*, *supra*; *Huff v. State*, 698 N.W.2d 430 (Minn. 2005). The district court’s decision in this case undermines the fundamental elements of his defense. He was

prevented from cross-examining the State's witnesses who had a direct connection to the crime. Two state witnesses had motive, opportunity, and means to commit this crime—surely this connection is sufficiently direct so as to raise “more than a mere suspicion that the alleged alternative perpetrator, and not the defendant, was the perpetrator.” *Richardson, supra*.

The district court abused its discretion when it refused to allow Mr. Larson to question witnesses as third party perpetrators. This evidence was highly probative, and would have presented serious doubts as to Mr. Larson's guilt. The prejudicial impact on the State's case was far outweighed by the probative value of this evidence. This is especially true given Mr. Larson's ability to make an offer of proof in advance, and the State's ability to address prejudicial impact on its own witnesses on redirect. A proper foundation had been laid, a sufficient nexus provided. This error, in combination with the errors that follow, completely stripped Mr. Larson of his ability to present his defense and to have a fair trial.

**B. The district court's finding that defense transcripts lacked sufficient authentication, and denial of Mr. Larson's request for an extension of time to obtain properly authenticated transcripts, deprived him of the foundation with which he could cross-examine the witnesses against him.**

Most, if not all, of the State's witnesses in this case gave wildly inconsistent statements to the investigating officers in the days that followed the murder. The interviews where these statements were made were taped, and the defense had them transcribed. Before trial, defense counsel sought to use the information in the transcripts in order to impeach the State's witnesses on the

stand. The State responded that the officers who took the statements would not have time to authenticate the transcripts, and the State apparently refused to create an authenticated version itself. The district court found that the transcripts lacked a sufficient foundation to establish their authenticity and precluded their use by the defense.

Where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation. *Crawford v. Washington*, 541 U.S. 36 (2004). Such testimonial statements include police interrogations. *Id.* (“even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.”). The Sixth Amendment requires that Mr. Larson be afforded the opportunity to confront and cross-examine witnesses against him. This is not a hollow requirement. The opportunity must be adequate, and meaningful. *U.S. v. Owens*, 484 U.S. 554 (1988). The primary right guaranteed by the Confrontation Clause is the opportunity to cross-examine and impeach witnesses. *State v. Pride*, 528 N.W.2d 862, 865 (Minn. 1995).

The district court’s refusal to, at a minimum, provide the defense adequate time to have the transcripts authenticated, severely limited Mr. Larson’s ability to cross-examine the State’s witnesses. Motion hearing Oct 1 p. 12 He was unable to refer to anything in the transcripts without facing a foundational objection. The district court reasoned that the witnesses’ testimony had been taken at Mr.

Larson's co-defendant's trial, and that this should be a sufficient basis to impeach the State's witnesses. However, the court ignored the fact that the co-defendant's trial had taken place but days before Mr. Larson's, and that the transcripts would not be available until after Mr. Larson's trial had commenced.

In light of the district court's other decisions, which limited Mr. Larson's opportunity to confront witnesses against him, the trial court abused its discretion. The State sought to limit severely Mr. Larson's ability to cross-examine the witnesses against him, and the district court acquiesced at every opportunity. While this particular evidentiary decision may not be the most egregious if it stood alone, that simply is not the case. This is yet another incident where the defendant is denied the opportunity to confront witnesses against him, in any true sense of the word. The cumulative effect of these decisions has deprived him of the right to a due process and a fair trial.

**C. The district court's decision to allow the State to proffer coconspirator nonhearsay statements of declarants who were available to testify at trial impermissibly circumvents the rule in *Crawford*, and deprived Mr. Larson of the right to confront witnesses against him.**

The State, in its case-in-chief, called several witnesses and asked each of them a truncated line of questioning. Thereafter, over Mr. Larson's objection, the State called the investigating officers to testify to certain statements, as co-conspirator non-hearsay, that those same witnesses had made during interrogations yet had not testified to on the stand. The purpose of this testimony was not to

impeach the State's own witnesses. Rather, the statements were intended to implicate Mr. Larson in a crime.

The rules governing hearsay generally prohibit its use when the declarant is available for trial, but is not present for cross-examination. *State v. Pierce*, 364 N.W.2d 801 (Minn. 1985). However, by rule a co-conspirator's declaration is not hearsay, and can be admitted when there has been a showing, by a preponderance of the evidence, that (1) there is a conspiracy involving both the declarant and the party against whom the statement is offered; and (2) that statement was made in the course of and in furtherance of the conspiracy. Minn. R. Evid. 801(2).

Notwithstanding, the United States Supreme Court has held that even where a witness is unavailable, a testimonial statement is admissible only if there was a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004). This is true even where the declarants are unavailable. *Id.* At a minimum, "testimonial statements" include prior testimony at a preliminary hearing, before a grand jury, at a formal trial, and to *police interrogations*. *Id.*

Here, the State wanted to introduce testimonial statements, i.e., police interrogations. But under *Crawford*, these statements are only admissible if Mr. Larson has had a prior opportunity to cross-examine them. *Id.* So what happens appears to be diabolical: the State puts the witnesses on the stand, and asks them questions so that the defense "has a prior opportunity to cross examine them." Thereafter, the State defines them as coconspirators, and gets in testimony that cannot be cross-examined. Specifically, the investigating officers testify

extensively to statements made by [REDACTED] and [REDACTED] as coconspirators—the same two witnesses that the State claimed lacked a direct nexus to be questioned as third party perpetrators.

The only conceivable reason that the State could have needed to have officers testify on [REDACTED] behalf is that the State believed he would seek 5<sup>th</sup> Amendment protection if asked to testify to these statements himself. But the officers did not testify to information that tended to incriminate [REDACTED]. Nor was he indicted, or charged over the year that passed before trial.

The crux of the issue here is that the State has circumvented Mr. Larson's ability under *Crawford* to cross-examine incriminating statements, made outside of court, during interrogations, by labeling the declarants "unindicted co-conspirators" and dissecting their testimony—one half that would be subject to cross, and one half that wouldn't. In fact the declarants were not viewed by the State as co-conspirators. On the contrary, the State put them on as its own witnesses, to offer self-serving testimony tending to inculcate Mr. Larson. These witnesses did not testify to their involvement in any conspiracy. Certainly the state didn't expect them to. One would be hard pressed to understand how the State could believe these witnesses to be co-conspirators, yet present them to testify to Mr. Larson's guilt and their own innocence, without suborning perjury.

The district court abused its discretion when it allowed the State to cherry-pick what witness statements would be available to cross-examination. Mr. Larson was denied any meaningful ability to cross-examine these statements, as

they were only presented as coconspirator nonhearsay. These statements were introduced in this manner, despite the fact that Anjubar was not only available, but had testified earlier on.

Furthermore, the “evidence” presented by the investigating officers, i.e., “coconspirator” statements, was much of the most extensive evidence presented against Mr. Larson. Mr. Larson was completely denied the opportunity to confront and cross-examine the State’s most key testimonial evidence, simply because the district court allowed it to be presented in an unfair fashion. Most if not all of these witnesses were available. *See, State v. Smith*, 563 N.W.2d 771 (Minn. Ct. App. 1997); *State v. King*, 622 N.W.2d 800 (Minn. 2001). They testified at the trial. The State was free to elicit statements from them the proper way, when it first put them on the stand. Instead, the State did here by circumventing the rules what it could not do by abiding them. The district court’s decision to allow this is no less than an abuse of discretion. And given the amount of evidence presented in this fashion, not subject to cross-examination, this cannot be deemed harmless error.

### CONCLUSION

The cumulative effect of the District Court’s evidentiary rulings has served to deprive Mr. Larson of an opportunity for a fair trial. The State circumvented the Mr. Larson’s 6<sup>th</sup> Amendment rights as described in *Crawford*, with a weak attempt to provide a chance for “prior cross examination.” And when witnesses were

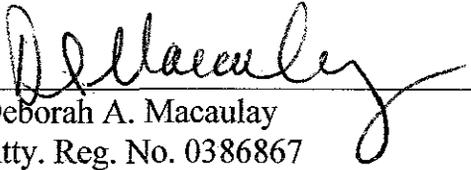
actually put on the stand, he was precluded from eliciting highly probative testimony concerning third party perpetrators, and he was denied the opportunity to lay a foundation to impeach them. This, combined with the State's repeated inappropriate references to Mr. Larson's attire, highly misleading use of DNA testimony, and egregious abuse of Mr. Larson's right to decline unwarranted searches, amounts to a denial of due process and the right to a fair trial. Mr. Larson respectfully requests that his conviction be reversed, and the case be remanded for a new trial.

Respectfully Submitted,

Dated: October 22, 2009

---

Craig E. Cascarano  
Atty. Reg. No. 0316842  
150 South 5<sup>th</sup> Street, Suite 3260  
Minneapolis, MN 55402  
(612) 333-6603



---

Deborah A. Macaulay  
Atty. Reg. No. 0386867  
649 Grand Avenue, Suite 2  
St. Paul, MN 55105  
(952) 240-1153

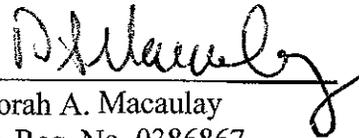
Attorneys for Appellant Robert Larson

CERTIFICATE OF BRIEF LENGTH

The undersigned certifies that the foregoing brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a proportional font. The length of this brief is 7,983 words. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

Dated: October 23, 2009



Deborah A. Macaulay  
Atty. Reg. No. 0386867  
649 Grand Avenue, Suite 2  
Saint Paul, MN 55105  
(952) 240-1153  
Attorney for Appellant